VIRGINIA LAW REGISTER

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The Albemarle Bar. II.

Through the efforts of Reverend Edgar Woods, we have in his valuable History of Albemarle County a list of lawyers who qualified at the Albemarle Bar from 1745. A hiatus occurs after 1749 up to 1783, as only one minute book was saved from Tarleton's flames, that being the one from 1744, the date of the foundation of the County, to 1749. So that the names of neither Jefferson nor Henry appear as having qualified, their qualification necessarily having been inscribed in the missing volumes.

The name of John Harvie and seven others appear in the Old Minute Book. Commencing in 1783 we have an unbroken roll of the attorneys, which Mr. Woods has arranged in five year periods, an arrangement likely to lead to some confusion unless noted—as for instance to the careless observer Thomas S. Martin—our distinguished Senator, lately deceased—is put down as a practitioner in 1865. He was then a boy in the Corps of Cadets and did not qualify until 1869. In the list put down as 1783 we find very familiar names, Crawford and Jouett and McDowell and Carr, but of the nine men who qualified in that period only two rose to eminence: One was John Breckinridge, grandfather of John C. Breckinridge, Vice-President of the United States and General in the Confederate Army. John was a member of the Virginia General Assembly, removed from Albemarle to Kentucky, held several public offices there. Was elected United States Senator from that State in 1801, a position he resigned to become Attorney General of the United States under Jefferson. He died in December 1806, at Lexington, Ky.

The other was John Walker, of Belvoir in Albemarle County —the eldest son of Dr. Thomas Walker—the Statesman and

pioneer—who lies in an unmarked grave on his splendid estate "Castle Hill." Dr. Walker was a representative in the House of Burgesses time and again, and was on the Committee of Safety. He was the Commissary of Washington's Regiment in Braddock's command. The sword he then wore hangs today in the writer's Library, having been worn in the Revolution by Dr. Walker's second son and namesake, and by Dr. Walker's great grandson, the writer's father, in the great struggle for Constitutional liberty in 1861-65.

John Walker was Confidential Aid to Washington during the Revolution and was Attorney for the Commonwealth for Albemarle County in 1783. He served in the House of Delegates with Jefferson for four terms. He was appointed United States Senator in 1790 to succeed William Grayson deceased, but was defeated for the position later on by William B. Giles. Another United States Senator also born in Albemarle qualified in 1791 —Walter Leake, who moved to Hinds County Missouri and was Senator from that State 1817-20 and Governor in 1821. He was of the same family as Shelton F. Leake of whom we will speak later on.

William Walter Henning who also resided in Albemarle qualified also in the five year period commencing in 1791. He is well known to the Virginia lawyers, as the compiler of the Virginia Statutes 1619-1792 and as a Reporter of the Court of Appeals. He was Grand Master of Masons in Virginia, 1805-1807.

In the same period qualified Archibald Stuart, who was a Revolutionary Soldier fighting at the Battle of Guilford Court House—a member of the Convention which adopted the Constitution of the United States and subsequently the first Judge of the first "Superior Court of Law and Chancery" in the Albemarle Circuit.

James Barbour of the adjoining county of Orange qualified in 1796. He was a member of the Virginia House of Delegates and its Speaker—was United States Senator from 1815 to 1825 when he resigned to become Secretary of War under John Quincy Adams. He was Minister to England in 1828-29. Whilst he was Secretary of War another member of the Albemarle Bar William Wirt was Attorney General of the United

States. He and Governor Barbour qualified at the Albemarle Bar in the same year. Of him we will comment at some length in our next article.

It is not uninteresting to note that in the period—1783-1796 of the Albemarle Bar, there qualified the men spoken of above—who were to occupy prominent positions. There were four of them to be United States Senators; two Governors; one Secretary of War and Minister to England, and one Attorney General of the United States.

Taking into consideration that a future President of the United States had qualified some years before (Jefferson qualified in 1757 according to his own record) the Bar of Albemarle County had a most auspicious beginning.

Virginia and Nova Scotia.

In the Morning Chronicle published in Halifax, N. S., February 11th, 1921, we note that plans are under way for the celebration of three extremely interesting events. The Editorial on that subject we believe will prove more interesting to our readers than anything we can write. Therefore, though some of it may seem to be repetition, we reproduce it:

"At the regular monthly meeting of the Nova Scotia Historical Society tonight the celebration of the bi-centenary of the establishment at Annapolis Royal of the First Court of English Judicature, in what is now the Dominion of Canada, will be discussed, and representatives of the Nova Scotia Bar Society and the Faculty of Law of Dalhousie University have been invited to attend and to join in formulating plans for appropriately commemorating this notable event in the history of our law courts. The other two events, as already announced, are the tercentenary of the grant by King James the First of the Charter creating the Baronetcies of Nova Scotia, which practically marked the foundation of New Scotland, and the centenary of the residence at Annapolis Royal of Thomas Chandler Haliburton, the famous Nova Scotia humorist.

"The Toronto Globe, in an editorial notice of these anniversaries, says that the celebration of the establishment of civil law will attract the attention of the English-speaking world.

Instead of choosing the laws of New England, with which Eastern Canada was in constant communication, the Governor and his Council selected those of Virginia. The quaintly-worded order-in-Council recording this decision was found by Mr. Justice Chisholm among some neglected papers, and reads as follows:

'At a Council held at His Excellency s House in his Majesty's Garrison of Annapolis Royal upon Wednesday, the 19th of April, 1721 . . . His Excellency Richard Phillips, Esq., Governor.

'His Excellency acquainted the Board that he had called them together to consider of establishing a Court of Judicature to be held for this Province; that one Article of his instruction is to make the lawes of Virginia a rule or pattern for this Government where they can be applicable to the present circumstances. That by the lawes of Virginia the Governor and Council were the Supreme Court of Judicature; called by the name of the General Court, which was fully advised on.

'Voted—That it would be for His Majesty's service, as well as very much for the satisfaction of the Inhabitants of this Province (under the present circumstances of affairs) that such a Court be held here by the Governor and Council as often as it shall be thought necessary.'

"This minute, the Globe notes, formed the subject of an address by J. Murray Clark, K. C., at Harvard University, which was afterward published in The VIRGINIA LAW REGISTER. In commenting upon it in a subsequent issue, Mr. Thomas W. Shelton, an eminent lawyer of Norfolk, Va., wrote:—'Dr. Clark is happily persisting in his diplomatic faculty of discovering affinities among people as well as among nations.' One affinity may be noted in the county organisation which we took from Virginia. The town and township organisation came from New England, but the county was invented in Virginia, and contained the germ of the federal principle, which is the main contribution of the United States to political science.

"It is well that these events should be fittingly and worthily celebrated. In these later days many of us are prone to forget the value of our historical background. Nova Scotia has a history which teems with romance. It also has a great distinction as a 'land of first things.' The historical fact that this was the first place, in what is now a great nation stretching from ocean to ocean, in which an English

> Court of Law was established, is well worthy of being signalised as a muniment in our history, and as showing how richly this little Province by the sea has contributed to the development of the legal system of the Dominion."

Increase in Value of Bonds Sold at Profit Not Income.

The decision of the Supreme Court of the United States (Eisner *v.* McComber, 252 U. S. 206, 40 Sup. Ct. 193; commented on in 6 V. L. R. N. S. 220) holding stock dividends not to be income created no little surprise in some quarters and much rejoicing in others. The reason for the rejoicing was obvious, but not so for the surprise in view of the numerous decisions that a stock dividend is a division really of capital.

The recent decision of Brewster *v.* Walsh, 268 Fed. 207, seems to follow logically the ruling in the Eisner Case and holds that the appreciation in the value of corporate bonds owned by a person not engaged in trading in such securities, though realized by a sale of the bonds at a profit, is not "income," within the meaning of the 16th Amendment but merely a capital increase. Consequently so much of Income Tax Law of 1916, sec. 2, subdivisions (a) and (b) as attempts to tax the profits from such a transaction, is unconstitutional.

This question did not arise in the Eisner Case and the nearest decision of the federal Supreme Court in point was handed down in construing the Income Tax Laws of 1867. In that case (Gray *v.* Darlington, 15 Wall. 63, 21 L. Ed. 45) it was decided that under the law of 1867 a gradual increase in value extending over a period of years could not be taxed as income for the year it was realized by sale. The court said:

> "The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series of years can in no just sense, be considered the gains, profits,

or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annul gains, profits, and income. * * * The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statutes. It constitutes and can be treated merely as increase of capital."

Respecting this decision, the Supreme Court in Lynch *v.* Turrish, 247 U. S. 221, 38 Sup. Ct. 537, said: "This case has not been since questioned or modified"—and met the government's attempt to distinguish Gray *v.* Darlington, in the following words:

"The government, however, makes its view depend upon disputable differences between certain words of the two acts. It urges that the act of 1913 makes the income taxed one 'arising or accruing' in the preceding calendar year, while the act of 1867 makes the income one 'derived.' Granting that there is a shade of difference between the words, it cannot be granted that Congress made that shade a criterion of intention and committed the construction of its legislation to the disputes of purists. Besides, the contention of the government does not reach the principle of Gray *v.* Darlington, which is that the gradual advance in the value of property during a series of years in no just sense can be ascribed to a particular year, not therefore as 'arising or accruing,' to meet the challenge of the words, in the last one of the years, as the government contends, and taxable as income for that year or when turned into cash. Indeed, the case decides that such advance in value is not income at all, but merely increase of capital and not subject to a tax as income."

In delivering the opinion in the principal case, (268 Fed. 214, 215) United States District Judge Thomas of the District of Connecticut said in part:

"The meaning of the word 'incomes' in the Sixteenth Amendment is no broader than its meaning in the act of 1867. It was adopted in its present form, using only the words 'incomes from whatever source derived,' with the presump-

tive knowledge on the part of Congress and the several state Legislatures, of the meaning attributed thereto by the decisions of the various courts, both state and federal.

"It has been held repeatedly that gains realized from the sale of capital assets held in trust are not income, but are principal—exactly as the securities were before they were sold, and that where a tenant for life is entitled to the entire net income of a fund, and the trustee realizes an advance in value by the sale of an investment, the life tenant is not entitled to the gain which is uniformly treated by the courts as an increment to principal and a part of the corpus of the trust.

"The following are a few of the leading cases sustaining the doctrine that the growth or increase of value, when realized on the sale of an investment, is accretion to capital and not income as between life tenant and remainderman: Boardman *v.* Mansfield, 79 Conn. 634, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178; Carpenter *v.* Perkins, 83 Conn. 11, 20, 74 Atl. 1062; Parker *v.* Johnson, 37 N. J. Eq. 366, 368; Outcalt *v.* Appleby, 36 N. J. Eq. 74, 78; Matter of Gerry, 103 N. Y. 445, 9 N. E. 235; Thayer *v.* Burr, 201 N. Y. 155, 157, 158, 94 N. E. 604; Graham's Estate, 198 Pa. 216, 47 Atl. 1108; Neel's Estate (No. 2) 207 Pa. 446, 56 Atl. 590; Lauman *v.* Foster, 157 Iowa, 275, 135 N. W. 14, 50 L. R. A. (N. S.) 531; Slocum *v.* Ames, 19 R. I. 401, 36 Atl. 1127; Jordan *v.* Jordan, 192 Mass. 337, 78 N. E. 459; Mercer *v.* Buchanan (C. C.) 132 Fed. 501, 508.

"These decisions had at the time of the adoption of the Sixteenth Amendment established a definite meaning of the word 'income' for the purpose of statutory and constitutional construction. It is difficult to see how the word 'income' can have any different meaning when applied to the proceeds of an investment, when held by a trustee, than when held by an individual, as the Income Tax Law specifically refers to funds held in trust. Section 2 (b).

"In order to show the conclusions reached by the courts, it will suffice to quote from only one of the cases to which reference is made supra. In Parker *v.* Johnson, 37 N. J. Eq. 366, the court said: 'The profit is not income. It was made by the trustee in the process of converting the investment, and, like a premium realized on the sale of government bonds in which the funds might be invested, it belongs to the fund. The trustee in this case is to keep the fund invested, and the tenant for life is entitled to the in-

terest. It is clearly the duty of the trustee to apply the profits on one investment to making up the losses on others.'

"So it seems that income from investments consists, in the case of bonds, of interest; in the case of stocks, of dividends. There is no income from the sale of investments. The conclusion seems imperative that the word 'income' has a well-defined meaning, not only in common speech, but also under judicial construction, and this meaning does not include the increase in value of capital assets when realized upon a sale. The following extract from the opinion of Mr. Justice Pitney in the Macomber Case, supra, 252 U. S. at page 206, 40 Sup. Ct. 193, 64 L. Ed. 521, is instructive: 'For the present purpose we require only a clear definition of the term "income," as used in common speech, in order to determine its meaning in the amendment.'

"It seems to me apparent that the Supreme Court, in Towne *v.* Eisner, 245 U. S. 418, 426, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254, and in Eisner *v.* Macomber, supra, followed the doctrine enunciated in Gibbons *v.* Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525, where it was held that a stock dividend is an accretion to capital, and not income, as between a life tenant and the remainderman, and therefore held in the Towne Case that a stock dividend was not income, within the meaning of the Income Tax Law of 1913, and in the Macomber Case that such a stock dividend was not income, within the meaning of the Sixteenth Amendment. As already stated, it is difficult to see why any different rule should be applied to the proceeds of an investment—purely a capital investment—when held by a trustee than when held by an individual."

A criticism of this decision in the February issue of the Columbia Law Review, is set out in full under *Miscellany* in this issue. B. S.

Evidence Obtained by Unlawful Search and Seizure.

Though the maxim that "every man's house is his castle" seems to have fallen into disuse in these days of prohibition enforcement, we should not forget that it is still a part of the law of the land and kept so by the state and federal constitutional provisions prohibiting unreasonable searches and seizures. Such constitutional prohibitions are intended to

afford the individual, however humble he may be, protection and security against any unlawful invasion of his premises or possessions by officers of the law, assuming to act under color of their office, and no officer has a lawful right to search on suspicion, or without a warrant expressly authorizing it, the possessions or premises of another, or anything found therein or thereon. This absolute security against unlawful search or seizure exists, without reference to the guilt or innocence of the person whose property or premises are searched. The mere fact that he is guilty, or that there may be reasonable grounds to believe that he is guilty, of the charge preferred against him, or the offense of which he is suspected, will afford no excuse or justification for an unlawful search or seizure. Cooley in his great work on Constitutional Limitations, p. 367, says:

> "Near in importance to exemption from any arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers, against even the process of the law, except in a few specified cases."

A great law writer once said that though the rain and the wind might enter an humble dwelling with impunity yet the majesty of the king could not without proper process of law. In recent years officers of the law have "gotten by" with so many unlawful searches and seizures that we have about come to the conclusion that Blackstone was "talking through his hat."

In a recent case (Youman *v.* Commonwealth, 224 S. W. 860) the Court of Appeals of Kentucky, in an exhaustive opinion reviewing the authorities, reaffirms the old common law maxim and takes a rap at those overzealous public officers who violate the law by unlawful search and seizure. The court held that under § 10 of the Kentucky constitution, prohibiting unreasonable searches and seizures, and providing for the issuance of search warrants, evidence of a search of defendant's premises for liquor and the discovery of liquor is inadmissible, in prosecution for the unlawful possession of intoxicants with intent to sell, where the law officers were acting in excess of their authority and without a search warrant. And it was further held

that objection to the admission of such incompetent evidence may be made during trial, and need not be raised by prior motion for return of the articles seized.

It was conceded by the prosecution that the evidence admitted on the trial, over the objection of the defendant, was obtained in an unlawful way by public officers charged with the duty of giving complete obedience to the Constitution and laws of the state. These officers, in violation of the Kentucky Constitution and in disregard of the statute pointing out the way in which premises might be searched, took the law into their own hands, invaded the premises of the suspected offender, and without asking or obtaining his consent searched for and found the liquor that was seized. On this state of facts the following very pertinent question arose: Will courts, established to administer justice and enforce the laws receive, over the objection of the accused, evidence that was admittedly obtained by a public officer in deliberate disregard of law? Will courts authorize and encourage public officers to violate the law, and thus inevitably bring the law into disrepute, in order that an accused may be found guilty? As to these questions the court said:

> "It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some courts have said, that the injured party has his cause of action against the officer, and this should be sufficient satisfaction. Perhaps, so far as the rights of the individual are concerned, this

> might answer; but it does not meet the demands of the law-abiding public, who are more interested in the preservation of fundamental principles than they are in the punishment of some petty offender."

Upon this subject the majority of the cases hold that the court will not stop in the course of the trial to inquire into the manner in which otherwise competent evidence was secured and allow it to be introduced, although it was secured by officers of the law in an unlawful way. Some of the cases so holding are People *v.* Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; Commonwealth *v.* Dana, 2 Metc. (Mass.) 329; State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465; Adams *v.* New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575. But there is another line of cases, headed by Weeks *v.* United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, holding that, where an officer of the law without a search warrant searches the premises of a person suspected of crime, and finds thereon articles or things that would aid in establishing his guilt, the evidence so obtained will not be competent, if a motion is made in the court in which the prosecution is pending, before the commencement of the trial, to return the articles seized in the course of the unlawful search, and objection is then and there made to the introduction of the articles as evidence.

As to the time for objecting to such evidence the Supreme Court of the United States in the Weeks Case, 232 U. S. 383, 34 Sup. Ct. 341, and the Michigan court in the Marxhausen Case, 204 Mich. 559, 171 N. W. 557, 3 L. R. A. 1505, held in effect that the motion to return the seized articles and objection to the introduction of the evidence found in the unlawful search must be made before the commencement of the trial, and that it would be too late to question the competency when offered in the progress of the trial. In referring to the holding of these cases the Kentucky Court said:

> "This practice, so far as our information goes, was first approved by the Supreme Court of the United States in the Weeks Case, and we have such high respect for the opinions of that great court that it is embarrassing to appear in the attitude of criticizing its views or declining to follow

them. But we find ourselves unable to approve this practice, first, because it is entirely unknown to the practice in this state, and, besides, does not seem to us to be based upon sound reasons. In our practice the proper time, and the only time, in which objection can be made to the introduction of evidence by the mouth of witnesses, is when it is offered during the trial, and we cannot think of any good reason why this practice should not obtain in a case like the one we are now considering. We confess our inability to appreciate the force of the reasoning that has resulted in the adoption of the rule that an exception to the general practice should be made in cases like this, on the ground that, if objection to the introduction of the evidence unlawfully obtained was permitted to be first made when it was offered in the course of the trial, the result would be to delay unnecessarily the trial of the case and require the court to go into a collateral issue for the purpose of determining whether the evidence offered had been lawfully or unlawfully obtained."

The Kentucky court is clearly right and the great respect we have for the courts holding that the objection must be made before the trial begins, does not prevent us from thinking that this practice is put on very narrow and untenable grounds.

B. S.

The Law's Delays.

As it is a good thing for the bench and bar occasionally to hear the opinion of an intelligent layman respecting the workings of the courts, the following comment of Richard Spillane, financial editor of the Philadelphia Public Ledger, written under the date of Sept. 15, 1920 is here set forth:

"There is a shortage of labor of all kinds today—office workers, factory workers, shop workers, farm workers—but you wouldn't think so if you went to court, The courts are crowded. The benches are packed. The corridors of the court buildings overflow. Some persons think time is valuable. You'd never think so if you went to court.

"As a matter of good citizenship a man went to court yesterday not many miles from Philadelphia. He was there all day, and all he did was to fret and fume over the utterly unwarranted delays. He left court believing nothing needs reform in America more than our judicial system, and that

one of the great wastes of the world is in the courts. He went into several court rooms in the long hours he was waiting for the case to be called in which he was to testify, and in each and all of them the same dawdling was apparent, the same indifference to the rights of the public and the same loafing by idlers and the same punishment of persons who were there on business.

"Cases that earnest, competent lawyers or sensible judges could dispose of in thirty minutes dragged on for hours and hours. Windbags and pettifoggers ranted or dawdled with ignorance or indifference to the wrong they were doing. And the judges permitted if they did not abet it. For example: A criminal case was called early in the day. The amount involved was $2. There were two persons accused —husband and wife. They were bad characters. A jury was impanelled and the case started early in the morning session. It dragged along until the mid-day recess. It was resumed after luncheon. Well along in the afternoon the lawyers began their addresses to the jury.

"The counsel for the defense pawed the air and shouted as he stressed matters that were inconsequential. He talked until he was tired and had made the jury and every sane person present tired. Then the district attorney started. He did not shout. He was quite moderate in everything except what he did to the English language. For the wrongs he did to it nothing short of a sentence of from three to five years in a grammar school would be fitting.

"After His Honor had permitted counsel for the defense and the district attorney to talk themselves out he got into the game himself.

"The case was as simple as A, B, C, but the charge the judge made to the jury was as complex as a Sam Lloyd chess problem. He explained the law in its bearing on this phase of the case and then on that. Next, he turned to a definition of reasonable doubt that left everybody doubting everybody and everything. Then he wandered on into new fields. He talked and he talked and he talked. From a perfectly clear understanding of the case the people in the room accumulated fog in their brains. Half a dozen times that judge declared he was leaving the case in the hands of the jury, but he didn't—at least he didn't when he made the promises. Instead he started off on a new tack. The people looked at each other and made signs indicative of earache or desire to sleep. One man caused a smile by asking

in a whisper if any one recalled the poem of Tennyson about the brook that goes on forever. The judge took the better part of an hour delivering a charge that a clear-headed judge could have expressed in five minutes or less. Instead of clarifying the case he muddled it.

"A court should be a place of dignity and of justice. There are many American courts that are neither. It is bad system that subpoenas workers, business men, active people to court, commands their presence and then lets them sit idle for hours or for days, doing nothing but wearing themselves into anger and disgust at courts by reason of their ill treatment. A judge who does not handle his court with regard to public rights should be removed. He wastes the time of workers and abuses good citizenship. There would be more respect for the courts if the judges attended to their business. There would be more respect for lawyers if lawyers didn't promote procrastination."

Judges and Baseball.

The much vaunted national sport having fallen upon evil days by reason of much crookedness among some of the players and wrangling among its leaders, the latter in order to give organized baseball "a good character" and place it upon a higher plane sought the good offices of Judge Kenesaw Mountain Landis, federal judge of the northern district of Illinois, and tendered to him the position of Supreme Arbiter of Baseball at the princely salary of $42,500 per year. That the Judge accepted is a matter of history and much comment. Most of the critical comment is because he did not resign his place on the bench and serve as judge in the baseball world only. His critics admit that he may be worth so much to the wrangling baseball clubs and that it is barely possible he can serve them well without neglecting his court duties, but they say that a judge sitting in both a federal and a baseball court is a spectacle lacking in dignity as the latter office can reflect no credit upon the former. Among his critics is the Michigan Law Review which in a recent number made the following comment:

"A man receiving a salary of $42,500 per year, the amount

which it is said Judge Landis is to get from baseball, may reasonably be expected even in these days of high wages to give at least a considerable portion of his energies and time to the work for which he receives such sum. It would seem inevitable that the public service must suffer by such division of effort.

"It must be further evident that it is the official position which Judge Landis holds and the really splendid record he has made in clearing up certain types of fraudulent and criminal practices that make him peculiarly acceptable to the baseball magnate. But for his judgeship he would probably be no more fitted or desired than thousands of able men interested in the national game. It appears to us that Judge Landis is prostituting his high office for the sake of a commercialized, professional sport."

The especial avenging angel of the spotlessness of the judicial ermine, is Representative Benjamin F. Welty, of Ohio, who has made much talk in the halls of congress and to the representatives of the press, concerning this unique case, and thereby has made himself known to fame. On Feb. 2, he introduced a resolution that the Committee on Judiciary be authorized to investigate Judge Landis' acceptance of the position of baseball arbiter and report what, if any, action should be taken by the House, and on Feb. 11, he introduced a bill "making it unlawful for any Judge appointed under the authority of the United States to receive compensation for exercising the duties of arbiter."

On Feb. 7th, Attorney General Palmer in a letter to Representative Welty, gave an official opinion that Judge Landis violated no law by accepting the position of baseball arbiter. The letter closes with this paragraph:

"While it might be true that the judge's duty as arbitrator would take so much of his time as to interfere substantially with the performance of his judicial duties, this, of course, would be a matter to be disposed of when such interference has actually occurred, and would probably be an objection only on the ground of incompetency, and considered upon that ground only."

The Journal of the American Bar Association has spoken favorably of the new honors of Judge Landis and in a recent

number gives a full account of the case. Law Notes makes the following friendly comment on the Judge's action:

> "Assuming his new duties will not take so much time as to interfere with the proper discharge of his judicial functions, there seems to be nothing except the novelty of the situation and the magnitude of the salary paid to cause any comment. There are many unpaid positions on committees and directorates which a public-spirited judge assumes from time to time, for which in fact his judicial prestige is one of his qualifications, and few if any of these involve more of real public usefulness than that which Judge Landis has accepted."

Judge Landis has publicly stated that he sees no impropriety in the situation and in an address before the Missouri Bar Association in December offered to resign from the bench (law not baseball) if "either house of Congress shall pass a resolution, a majority of the members voting for it, expressing that House's disapproval of this thing."

There seems to be no inherent incongruity or incompatibility between acting as baseball arbiter and sitting on the bench of a federal court. There is nothing in the general law or specific Acts of Congress which prohibits federal judges from receiving additional compensation for the performance of other than strictly judicial duties. In fact in several instances judges have acted as commissioners in passing upon claims against the government. At least one such case has been before the Supreme Court of the United States. In United States *v.* Ferreira, 13 How. 40, in referring to the act of congress directing the judge of the territorial court of Florida to adjust claims for losses under a treaty with Spain, the court held that the authority conferred on the judge was nothing more than that of a commissioner to adjust certain claims against the United States, and that his decision was not the judgment of a court of justice, but the award of a commissioner. The opinion of the attorney general instances the payment of extra compensation to Judge Putnam under his appointment as commissioner to decide the claims arising out of the seizure of British vessels in Bering Sea.

The fact that actions and decisions of Judge Landis as baseball arbiter might come up collaterally in the court in which he presides does not affect his right to hold the position though it might make it improper for him to sit in some particular cases. And so long as the Judge does not neglect any of his court duties he is to be commended rather than criticized for trying to uplift the national sport and as he expressed it, "give the best I have got to bring the game back to where it was and to keeping it where tens of millions of people want it to be."

B. S.

The Lenient Judge—"Thou Shalt Not Steal."

Judge Landis first introduced himself to front page readers several years ago by the novelty of imposing a $29,000,000 fine upon the Standard Oil Company. Lately he has again received much publicity not only because of his association with organized baseball, but also by reason of certain language attributed to him by the newspapers, in connection with a bank embezzlement case. In this case the defendant, a nineteen year old teller of a country bank in Illinois, was brought before the court charged with having embezzled $96,000, of the bank's funds. He pleaded guilty. It appeared that he received a salary of $90 per month on which he had to support himself, his mother, and two sisters, and that he had voluntarily surrendered himself and returned the stolen money. Judge Landis paroled the defendant in custody of his lawyer pending the decision of the case. It is reported that the Judge said that the directors of the bank were to blame, and told the boy to go home and that he would send for him when he wanted him.

The action of the Judge in this case has called forth much criticism. He has been reminded of the commandment "thou shalt not steal" and the fact that most thieves plead necessity as an excuse for crime. Senator Dial, of South Carolina characterized the language as outrageous and on the floor of the Senate declared his intention to confer with members of the House with a view to possible impeachment. Judge Landis

promptly replied with a statement of the case in question and with the declaration that he had said that "the board of directors that was guilty of creating the condition I have outlined would naturally invite embezzlement. I repeat that here and I send that to Senator Dial with my compliments."

The course of the Judge in this case was somewhat unconvention and unusual and may be indefensible legally, but his language in reproving the bank officials for paying so little to one who was trusted to handle large sums of money can hardly be said to furnish grounds for impeachment.

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